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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.A.No. 725 OF 2005

APPELLANT (IN JAIL)

Adil Khan,
S/o. Shri Namdar Khan,
Aged about 21 years,
Occupation- Hotel Business,
R/o. Shitlapara, Kanker,
District Kanker (C.G.)

Vs.

RESPONDENT

State of Chhattisgarh,
Through P.S. Korer,
District Kanker (C.G.)

Cr.A.No. 748 OF 2005

APPELLANTS (IN JAIL)

1. Sheikh Zaheer,
S/o. Shri Safiullah,
Aged about 21 years,
Occupation- Meat Seller,

2. Sheikh Zakir,
S/o. Shri Safiullah,
Aged about 22 years,
Occupation-Dynamo Mechanic,

3. Mohd. Irfan alias Vikki,
S/o. Mohd. Illiyas,
Aged about 21 years,
Student,
All R/o. Shitlapara,
Kanker, Dist. Kanker (C.G.)

4. Sheikh Arif,
S/o. Sheikh Masoor,
Aged about 21 years,
Student, R/o. Mahadev Ward,
Kanker, Dist. Kanker (C.G.)

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Vs.

RESPONDENT — State of Chhattisgarh, Through P.S. Korer, District Kanker (C.G.)

And

Cr.A.No. 924 OF 2005

APPELLANT (IN JAIL) : Md. Irfan alias Vikky aged about 19 Years, S/o Md. Illiyas R/o Shitalapara, Kanker P.O. & Distt. Kanker

Vs.

RESPONDENT — The State of Chhattisgarh, Through P.S. Kanker District Kanker (C.G.)

Present:

Mrs. Fouzia Mirza, learned counsel for the appellants in Cr.A.No. 725/05 and Cr.A.No.748/05.

Mr. D.R. Sharma, learned Senior counsel in Cr.A.No.921/05.

Mrs. Madhunisha Singh, learned Panel Lawyer for the State.

ORAL JUDGMENT

(25th October 2007)

Dhirendra Mishra, J

Criminal Appeal No. 725/05 preferred by appellant Adil Khan, Criminal Appeal No. 748/05 preferred by appellants Sheikh Zaheer, Sheikh Zakir, Mohd. Irfan alias Vikki, Sheikh Arif and Criminal Appeal No. 924/05 Md. Irfan alias Vikky are

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being disposed of by this common judgment as all these appeals arise out of the judgment of conviction and order of sentence dated 3.9.2005 passed in S.T.No. 09/2005 whereby learned Additional Sessions Judge, Kanker has convicted the appellants under Section 397 of Indian Penal Code and sentence each of them to undergo RI for 10 years.

Since in Criminal Appeal No. 748/05 Mohd. Irfan @ Vikky is also one of the appellants, Criminal Appeal No. 924/05 preferred at his instance is disposed of being unnecessary.

2. Case of the prosecution in brief is that on 7.10.2004 around 12.00 noon complainant Dharam Jain, resident of Village Chilhadi, was going with Ajju @ Ajay Upadhyaya (PW-17) by motorcycle to Village Mode. The motorcycle was being driven by Ajay Upadhyaya. Around 2.00 O'clock when they reached between Village Mode and Telawat, some persons coming on 7-8 motorcycles from Village Telawat side, two of them were identified as Zakir and Zaheer, stopped their motorcycle by placing their motorcycle before and thereafter Zakir, who was holding iron rod and Zahir, who was holding stick, started assaulting Ajay. Other persons, who were 18-20 in number, were also armed with rod, stick and chain, started assaulting. Ajay sustained injuries on his head, left eye, thumb of the right hand and stomach. After the incident Ajay

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discovered that those persons had looted gold necklace and a bag containing Rs.5,000/- in denomination of 20, 50 and 100. Report was lodged by Dharam Jain on the same day at about 2.30 p.m. in Police Station Korar vide Ex.P/23. Complainant Dharam Jain was sent for medical examination to Primary Health Center, Korar on 8.10.2004 and his injury report is Ex.P/21 whereas injured Ajay was also sent for medical examination on 7.10.2004 and his injury report is Ex.P/24-A. Injured Ajay was admitted in the District Hospital, Kanker on the date of incident. However, he was referred to higher center for treatment vide discharge ticket of Ex.P/37. Thereafter, he was admitted in B.S.P. Hospital and was discharged from their on 16.10.2004 vide Ex.P/35. He was also treated at Sankara Nethralaya and the treatment paper is Ex.P/38. During investigation Sheikh Zahir, Zakirullah, Mohd. Irfan, Sheikh Arif, Mohd. Javed, Mohd. Afzal Khan, Adil Khan were arrested on 10.10.2004. On the basis of memorandum statement of accused Sheikh Zahir motorcycle, hockey stick and cash of Rs.200/- were seized from him vide Ex.P/4 and T.V.S. Suzuki, iron rod and cash of Rs.200/- were seized from Zakir vide Ex.P/6. Similarly, cash and weapon of offence have also been seized from accused Mohd. Irfan, Sheikh Arif, Mohd. Javed, Mohd. Afzal, Adil Khan, Laxminarayan vide seizure memorandums of Ex.P/8, P/10, P/12, P/14, P/16 and P/18 respectively. Appellants Mohd. Irfan, Adil Khan, Mohd. Javed,

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Mohd. Arif and Mohd. Afzal were put for test identification on 11.11.2004 by Executive Magistrate D.R. Thakur (PW-13) where Dharam Jain (PW-18) correctly identified Mohd. Irfan, Adil Khan and Sheikh Arif as the persons involved in the crime.

3. After completing investigation charge sheet was filed against the appellants and four other accused persons namely Mohd. Afzal, Adil Khan, Laxminarayan and Ramesh in the Court of Judicial Magistrate First Class, Kanker. However, charge sheet against two accused Zafar Ali and Faiz Khan was filed before the Juvenile Justice Board, Jagdalpur as their age was less than 18 years on the date of incident.

4. During trial the prosecution examined 22 witnesses in all. Thereafter, statements of the accused persons were recorded in which they denied the circumstances appearing against them in the prosecution case and pleaded innocence and false implication. Learned trial Court after hearing counsel for the respective parties convicted and sentenced the present appellants as mentioned in paragraph 1 of this judgment. However, other four accused persons were acquitted of the charges by extending them benefit of doubt.

5. Learned counsel for the appellants argued that conviction of the appellants is mainly based on the test identification conducted by Executive Magistrate on

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11.11.2004, in which the complainant Dharam Jain identified the appellants. However, appellants Mohd. Irfan, Adil Khan and Sheikh Arif were already arrested on 10.10.2004 and the identification parade was conducted only on 11.11.2004 and there is no explanation for this inordinate delay of one month in conducting test identification parade. It is also argued that there is evidence available on record that during remand proceedings the appellants were produced before the Court ~~by~~ without covering their faces, Dharam Jain (PW-18) visited police station to enquire whether the accused persons have been arrested or not and therefore, there was possibility that the complainant had an opportunity to see the appellants either in the police station or during remand proceedings when the accused persons were produced in the Court. It is further contended that Dharam has denied in his Court statement having identified accused Adil Khan though in the test identification memo of Ex.P/22 it is mentioned that he correctly identified Adil Khan. Thus, the whole identification by Dharam in T.I. parade becomes doubtful. Injured Ajay Upadhyaya (PW-17) had opportunity to see the accused persons as he was assaulted by all the accused as alleged by the prosecution, however, Ajay did not participate in the test identification parade and there is no explanation as to why the prosecution did not conduct test identification parade before him. Referring to the statements of PW-13 D.R. Thakur, it was vehemently

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argued that the persons mixed with the accused persons were not of similar appearance, the proforma for test identification parade was prepared well in advance and there is discrepancy in the entries and all these irregularities create serious doubt about authenticity of the T.I. parade. Explanation given by PW-15 Roop Singh Sahu in paragraph 27 of his deposition for delay in conducting T.I. parade is falsified from the statement of Dharam, who has admitted in his deposition that after the incident he used to go to police station to enquire whether the accused persons have been arrested or not and thus, he was very much present and available to the police for participating in the test identification parade.

6. Placing reliance on the judgments in the matters of **Nirmal Pasi and another Vs. State of Bihar, 2002 Judgments Online 1229**, **Rajesh Govind Jagesha Vs. State of Maharashtra, AIR 2000 SC 160**, **Puttan alias Kamal Prasad Vs. State of U.P., AIR 1992 SC 1032** and in the matter of **Anwar and another Vs. State, AIR 1961 Allahabad 50** it is argued that that statement of Ajay Upadhyaya was recorded on 26.11.2004 i.e. about more than one month 20 days after the incident though he was available in police station on the date of incident itself. It is also argued that there is no evidence that the accused persons looted ornament and cash as the complainant PW-18 Dharam in paragraph 2 of

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his deposition has stated that when he took the injured Ajay to hospital, he told him that cash of Rs.5000/- and gold necklace are missing and he suspected that accused persons might have taken the same. Referring to the statement of Dharam Jain it is contended that this witness has categorically stated that he identifies only Mohd. Irfan, Arif and Javed by faces and he does not recognize rest of the accused persons. However, the learned trial Court on the basis of test identification parade has also convicted accused Mohd. Adil Khan though there is no admissible evidence against him. There is manipulation and overwriting in the First Information Report as has been admitted by Manohar Kerketta (PW-12) in paragraph 11 of his deposition.

7. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court.

8. I have heard learned counsel for both the parties and perused the material available on record including the impugned judgment.

9. Conviction of the appellants is based on the statements of complainant Dharam Jain, injured witness Ajay Upadhyaya. The Court below has observed that the statements of these witnesses are duly corroborated from the statements of Shyam

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Shukla (PW-16), Shiva Shukla (PW-19) as also from the statement of Dr. Divya Pal (PW-22), who has proved the injury report (Ex.P/24-A) of Ajay Upadhyaya.

10. In the matter of *Nirmal Pasi* (supra) the Hon'ble Supreme Court considering the delay of more than one month in conducting test identification parade after arrest of the accused persons, which was not satisfactorily explained by the prosecution, held the same to be one of the reasons for not relying upon the evidence of identification.

11. In the matter of *Rajesh Govind Jagesha* (supra) also the identification parade was held with an inordinate delay of about five weeks from the arrest of the accused and considering the explanation offered by the prosecution for the same untrustworthy, the accused was extended benefit of doubt.

12. Similar is the view expressed in the case of *Puttan alias Kamal Prasad* (supra) where the Hon'ble Supreme Court considering the inordinate delay of six months, which could not be explained, held that the Court below erred in relying upon such evidence of identification.

13. In the matter of *Anwar and another* (supra) it has been held that the evidence of identification can be accepted only if

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the Court is satisfied that the witness had at least a fair opportunity of seeing the dacoits, the identification parade was held within a reasonable time of the incident and conduct of the witness was reliable and the witness did not get opportunity of seeing the accused after the arrest.

14. In the light of above principles of law laid down by the Hon'ble Supreme Court if the facts of the present case are scrutinized, it would be evident that in the FIR accused Zakir and Zahir have been mentioned with name along with other 18-20 others. However, no description has been given about any other associate nor it has been mentioned that if they are presented before the complainant, he shall be in a position to identify them. From the evidence available on record, it is also observed that he recognizes accused Zakir and Zahir as they are resident of Kanker. However, all the accused persons, who were put to trial, are the residents of Kanker but the complainant does not mention this fact that they were residents of Kanker. In the test identification parade he identified appellant Mohd. Irfan, Adil Khan and Sheikh Arif but in his Court statement he claimed to have identified accused Javed and denied having identified convicted accused Adil Khan. The explanation given by the investigating officer (PW-15) for delay in conducting test identification parade that the memo for conducting T.I. parade was sent to the Tehsildar, is

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not established from the statement of D.R. Thakur (PW-13), who has stated that he received the communication for conducting test identification only on 11.11.2004. The further explanation by the prosecution that complainant Dharam was not available on 10.10.2004 is also belied from the statement of Dharam, who has stated in his cross-examination that even after the incident he regularly went to police station to enquire whether any arrest has been made thereafter or not. Moreover, Ajay Upadhyaya, who got injured in the incident and had opportunity to see the offenders for a longer period than Dharam, ~~was~~ has not participated in the T.I. parade. Though the investigating officer in his deposition has claimed that the accused persons were produced in the Court in remand proceedings by covering their faces, but the remand papers do not reflect the same and in view of admission of the complainant that he visited police station after the incident to enquire about arrest of the accused persons, defence of the appellants that the complainant had an opportunity to see them before T.I. parade either in police station or during remand proceedings, may be probablized.

15. On the basis of aforesaid discussions, this Court is of the considered opinion that the Court below was not justified firstly in convicting appellant Adil Khan solely on the basis of test identification parade, particularly when the complainant

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himself has admitted in his deposition before the Court that he never identified him and secondly, in convicting appellants Sheikh Arif and Mohd. Irfan on the basis of their identification by PW-17 Ajay Upadhyaya and PW-18 Dharam Jain.

16. So far as conviction of the appellant Sheikh Zahir and Sheikh Zakir is concerned, their name figures in the promptly lodged F.I.R., which was lodged only 30 minutes after the incident at about 2.30 p.m. and both the eyewitnesses i.e. Dharam and Ajay, have identified the above two accused persons during trial. Dr. A.B. Deshpandey (PW-21), who examined injured Ajay on 8.10.2004 has categorically stated that on examination of the injured he found perforation in his left eye, he was admitted in the hospital, his left eye was stitched, there was loss of sight in left eye, on C.T. Scan it was found that lens of the eye was displaced and the eye was full of blood. So far as argument advanced by learned counsel for the appellants on their behalf that there was no fracture injury in the surrounding bones and report of Ex.P/37 does not mention complete privation of sight in the left eye, as such no grievous injury was sustained by him as claimed by the prosecution, is concerned, the same cannot be accepted particularly in view of statement of injured Ajay who has stated that he was assaulted with rod and stick, as a result of which he sustained injury on

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his left eye and further stated that after assaulting him the gold necklace and amount of Rs.5,000/- were snatched.

17. In the result:

1. Cr.A.No. 725/05 is allowed. Conviction of appellant Adil Khan under Section 397 of IPC and sentence imposed thereon, are set aside. He is acquitted of the above charge. He is on bail, therefore, his bail bonds are discharges and he need not surrender.
2. Cr.A. No. 748/05 is partly allowed. Conviction of the appellants Mohd. Irfan and Sheikh Arif under Section 397 of IPC and sentence imposed thereon are set aside. They are acquitted of the above charge and they be set at liberty forthwith if not required in any other case. However, the appeal of appellants Sheikh Zaheer and Sheikh Zakir being devoid of substance is hereby dismissed.

Sd/-
Dhirendra Mishra
Judge

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